

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Virgil Frank Calamese,

Petitioner,

v.

Civ. No. 07-1761 (JNE/JJG)
ORDER

Terry Carlson,

Respondent.

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (2000). In a Report and Recommendation dated April 9, 2007, the Honorable Jeanne J. Graham, United States Magistrate Judge, recommended that the petition be denied, that Petitioner's application to proceed in forma pauperis be denied, and that this action be dismissed with prejudice. Neither party objected to the Report and Recommendation. Based on a de novo review of the record, the Court adopts the Report and Recommendation. *See* D. Minn. LR 72.2(b).

An appeal may not be taken from a final order denying a petition under section 2254 without a certificate of appealability (COA). 28 U.S.C. § 2253(c)(1)(A) (2000); Fed. R. App. P. 22(b)(1). Courts cannot grant a COA unless the applicant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons set forth in the Report and Recommendation, Petitioner's habeas corpus petition is plainly barred by the statute of limitations. *Id.* § 2244(d). Under these circumstances, Petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, Petitioner is not entitled to a COA.

After filing a notice of appeal, Petitioner sought leave to proceed in forma pauperis on appeal. "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." *Id.* § 1915(a)(3). A party demonstrates good faith by seeking appellate review of issues that are not frivolous. *Coppedge v. United States*, 369 U.S. 438, 445

(1962). As set forth in the Report and Recommendation, Petitioner's action is untimely.

Petitioner has not demonstrated that this conclusion is arguable on its merits and, therefore, has not demonstrated that he seeks "appellate review of any issue not frivolous." *Id.* The Court therefore certifies that Petitioner's appeal is not taken in good faith and denies his application to proceed in forma pauperis on appeal.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Petitioner's petition for a writ of habeas corpus [Docket No. 1] is DENIED.
2. This action is DISMISSED WITH PREJUDICE.
3. Petitioner's application to proceed in forma pauperis [Docket No. 2] is DENIED.
4. Petitioner is not entitled to a certificate of appealability.
5. Petitioner's application to proceed in forma pauperis on appeal [Docket No. 8] is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 27, 2007

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge